

ROBERT R. WALKER
RIO PETROL, INC.

IBLA 97-350

Decided August 4, 1997

Appeals from Decisions of the Acting Associate Director for Royalty Management, Minerals Management Service, denying Requests for Suspension of the Requirement to Correct Violations set forth in Notices of Noncompliance. Case Nos. CP97-002 and CP97-003.

Reversed and remanded.

1. Federal Oil and Gas Royalty Management Act of 1982:
Civil Penalties--Oil and Gas Leases: Civil Assessments
and Penalties

Under the regulation at 30 C.F.R. § 241.51(e), civil penalties shall accrue until the violation is corrected, but the Director, Minerals Management Service, is authorized to suspend the requirement to correct the violation pending a hearing and any further administrative appeal upon a finding that a suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a request for a suspension pending resolution of a contested violation pursuant to a timely filed hearing request may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue and it does not appear from the record that a stay is contrary to the public interest.

APPEARANCES: Nancy L. Pell, Esq., Washington, D.C., for Appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Robert R. Walker and Rio Petrol, Inc., from the April 11, 1997, Decision of the Acting Associate Director for Royalty Management, on behalf of the Director, Minerals Management Service (MMS), denying their Request for Suspension of the Requirement to Correct Violations. The Request for Suspension was prompted by separate Notices of Noncompliance (NONC), dated February 19, 1997, issued by MMS to Appellants

for failure to calculate and pay royalties due on Federal oil and gas leases. The NONC's were issued pursuant to section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (1994).

By their terms, the NONC's required that certain remedial actions be taken within 20 days of receipt. The NONC sent to Appellant Walker noted that MMS had previously issued an Order dated October 13, 1994, requiring Walker to pay additional royalties for certain Federal oil and gas leases in the amount of \$27,003.80 for the period April 1989 through December 1993 and to report and pay royalties as outlined in Enclosure 3 to the Order beginning in January 1994. Noting that Appellant Walker had neither complied with the Order nor filed any appeal from the Order, the NONC directed Walker to pay the additional royalties for the period of April 1989 through December 1993 and "to calculate and pay any additional royalties for the period January 1994 through the present in accordance with the enclosure to the order [of October 13, 1994]." (NONC at 1-2.) Similarly, the NONC sent to Appellant Rio Petrol, referring to the same oil and gas leases, stated that MMS had issued "an order to pay \$24,302.07 in royalties for the Period April 1989 through December 1993" and "to report and pay future royalties as outlined in Enclosure 3 to the order." (NONC at 1.) A copy of the Order, also dated October 13, 1994, was enclosed with the NONC. After noting that Rio Petrol had neither appealed the Order nor complied with its terms, the NONC required Rio Petrol to pay the additional royalty calculated for the April 1989 through December 1993 period "and to calculate and pay any additional royalties for the period January 1994 through the present in accordance with the enclosure to the order." Id. at 1-2.

Both of the NONC's issued by MMS allowed Appellants 20 days from receipt to comply to avoid a civil penalty accruing from the date of receipt of the NONC at the rate of up to \$500 per violation per day (for the first 40 days) and up to \$5,000 per day thereafter under section 109 of FOGRMA. 30 C.F.R. § 241.51(a)(3). Appellants were also advised in the NONC's that if payment was not submitted to remedy the violations, a hearing before an Administrative Law Judge could be requested. Further, MMS noted that a request for a hearing would not stay the accrual of penalties which would accrue unless the requirement to correct the violation is suspended pursuant to an application filed with MMS.

Subsequently, by a document dated April 10, 1997, and filed with MMS, Appellants requested a hearing before an Administrative Law Judge pursuant to 30 C.F.R. § 241.51(a)(3)(iii). In that same document, Appellants also requested suspension of the requirement to correct the violations pending completion of the hearing pursuant to 30 C.F.R. § 241.51(e), stating that they were prepared to post a bond in an amount "deemed adequate to indemnify the United States from loss or damage." The request for suspension was denied without explanation by the Acting Associate Director for Royalty Management, MMS, in a letter dated April 11, 1997.

Appellants have filed a Petition for Stay of the MMS Decision denying the request for suspension citing the regulations at 43 C.F.R. § 4.21. In support of the Petition, Appellants have focussed on the relevant factors including irreparable harm threatened, the relative harm to the parties, the likelihood of success on the merits, and the public interest. See 43 C.F.R. § 4.21(b). In addressing the likelihood of success on the appeal from denial of the suspension, Appellants have cited this Board's decision in Marathon Oil Co., 90 IBLA 236, 93 Interior Dec. 6 (1986). In analyzing the public interest, Appellants have cited the recent Court decision in IPAA v. Babbitt, 92 F.3d 1248 (D.C. Cir. 1996), on judicial review of a final Departmental decision assertedly involving similar issues of royalty payments due on take-or-pay contract settlement buyouts and buydowns. Appellants contend that MMS should not be allowed to use civil penalties "to bludgeon two small companies into submission on a matter the Department has already litigated and lost." (Petition for Stay at 7.)

In reviewing this matter, it is important to recognize that the issue before the Board is the propriety of the MMS decision denying the request for suspension of the requirement to correct violations pending review of the violations alleged in the NONC's at the hearing conducted by the Administrative Law Judge. Review of the merits of the violations alleged in the NONC's and the propriety of any potential penalty is currently within the jurisdiction of the Administrative Law Judge. See 30 C.F.R. § 241.51(f). Although the regulations provide for a further appeal to this Board under the procedures at 43 C.F.R. Part 4 by any party to the case adversely affected by the decision of the Administrative Law Judge, the merits of the NONC's are not presently before us for review. See 30 C.F.R. § 241.51(f).

[1] Upon review of the stay request and the arguments addressing the merits of the decision under appeal, we find it appropriate to expedite our consideration of this appeal and decide the case. Our review of the decision of the Acting Associate Director for Royalty Management, MMS, denying the suspension is guided by the language of the relevant regulation:

(e) If the person served with a notice of noncompliance requests a hearing on the record pursuant to paragraph (a)(3)(iii) or paragraph (b)(4) of this section, penalties shall accrue each day until the person corrects the violations set forth in the notice of noncompliance. The Director, MMS, may suspend the requirement to correct the violations pending completion of the hearings provided by this section, but only if the Director, MMS, suspends the obligation in writing, and then only upon a determination, at the discretion of the Director, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. The amount of the bond must be sufficient to cover any disputed amounts plus

accrued penalties and interest. The MMS may require, at any time, adjustment in the amount of the bond for increases in the amount of the underlying obligations determined by MMS to be due, for penalties or for interest.

30 C.F.R. § 241.51(e). The operative language of this regulation guiding the exercise of discretion by MMS in granting a suspension is virtually identical to the language of the former "pay-pending-appeal regulation," 30 C.F.R. § 243.2 (1986), controlling when payment of disputed royalty assessments is required pending administrative review of the royalty assessment. ^{1/}

In reviewing the denial of a stay of the requirement to pay the disputed royalty amounts pending appeal under 30 C.F.R. § 243.2 (1986) in the Marathon case we held:

When a determination is left to the discretion of an agency, the general rule is that a decision made in the exercise of that discretion should be upheld unless it is arbitrary and capricious. Further, a decision is arbitrary and capricious when it is made on a basis other than the standard articulated in the authorizing statute or the implementing regulation. Eudey v. Central Intelligence Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979); see Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 43 (1983); Frisby v. U.S. Department of Housing & Urban Development, 755 F.2d 1052, 1055 (3rd Cir. 1985).

Our review of the decision of the Acting Director in exercising his discretion whether to grant or deny a stay under 30 CFR 243.2 must be performed with reference to the content of that regulation. Again, that regulation provides that the Director may authorize in writing a suspension of an order or decision "upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage." 30 CFR 243.2. Thus, the crucial issue, assuming that an acceptable bond (adequate to indemnify the lessor from loss or damage) is tendered, is whether the grant of a suspension will be detrimental to the lessor.

^{1/} That regulation provided as follows:

"Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, bonuses, penalties or other assessments, shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, MMS * * * and then only upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

Marathon Oil Co., 90 IBLA at 242-43, 93 Interior Dec. at 10. We further noted that "[s]ince the issue is the liability for a certain dollar amount of royalty, there is little apparent reason why provision of an adequate bond may not be sufficient to protect the interest of the lessor." Id. at 243, 93 Interior Dec. at 10. Noting that both provisions of FOGPMA and the implementing regulations provide for collection of interest on royalty amounts found to be due but not timely paid, we reversed a decision which gave "no explanation why a bond in the amount of the disputed obligation is not sufficient to protect the interest of the lessor." Id. at 244, 93 Interior Dec. at 11. We find this precedent to be controlling in the context of the regulation at issue in the present case. As noted above, the operative language of the regulation at issue here is virtually the same as that of the pay-pending-appeal regulation applied by the Board in Marathon. 2/ Like the decision under review in Marathon, the Decision under appeal rejects the application, but gives no explanation why a bond in the amount of the disputed obligation is not sufficient to protect the interest of the lessor. 3/ Id. Accordingly, we reverse the decision to deny the Request for Suspension of the Requirement to Correct Violations pending administrative review of the NONC subject to provision by Appellants of a bond deemed adequate by MMS to protect the interests of the lessor and remand the Request to MMS to allow determination of the amount of a bond sufficient to protect the interests of the lessor. 4/

2/ The similarity of the language is not surprising when it is recognized that the regulation at 30 C.F.R. § 241.51 was promulgated in the same rulemaking as the former 30 C.F.R. § 243.2 (1986). 30 Fed. Reg. 37352 (Sept. 21, 1984). The language of the latter (pay-pending-appeal) regulation was subsequently modified in part for the express purpose of clarifying the intent of MMS to comply with the language of the regulation as applied by the Board in the Marathon case. 57 Fed. Reg. 44992, 44997 (Sept. 30, 1992); 55 Fed. Reg. 6401, 6402 (Feb. 23, 1990) (proposed regulation). The regulation at 30 C.F.R. § 241.51, however, was not modified.

3/ In Marathon, we noted that under the Administrative Procedure Act, 5 U.S.C. § 704 (1994), failure to stay an order requiring compliance or payment generally makes it a final Departmental decision subject to immediate judicial review. See 43 C.F.R. § 4.21(c). Further, we found that the public interest is not generally served by short-circuiting the administrative review process within the Department and making the initial decision the final Departmental decision for purposes of judicial review. 90 IBLA at 248, 93 Interior Dec. at 13.

4/ We have been advised by counsel for Appellants that during the review of this stay petition by the Board, MMS has proceeded to issue a "Penalty Notice and Order Assessing Civil Penalty" against both Appellants in this case. Because we have reversed the decisions below denying the request for suspension, it follows that these civil penalty assessments are necessarily vacated as premature.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions denying a suspension of the requirement to comply with the NONC's pending administrative review are reversed subject to provision by Appellants of a bond deemed adequate by MMS to protect the interests of the lessor, and this aspect of the case is remanded to MMS to allow determination of the amount of a bond sufficient to protect the interests of the lessor.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge